

Submission

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Competition Taskforce Division
Treasury
Langton Cres
Parkes ACT 2600

Via: CompetitionTaskforce@treasury.gov.au

Issues Paper: Non-competes and other restraints: understanding the impacts on jobs, business and productivity

Dear Competition Taskforce,

NT Working Women's Centre thank you for the opportunity to contribute to the consultation regarding non-compete and related clauses that restrict workers.

About the NT Working Women's Centre

The NT Working Women's Centre (NTWWC) is a community based, not-for-profit organisation that provides free and confidential advice and support services on work-related matters to women and gender diverse people in the NT. Services commenced in 1994, and we operate across the NT from two offices in Darwin and Alice Springs.

The NTWWC works primarily with women who are not represented by a union, lawyer, or other advocate. Women who contact our Centre are often economically disadvantaged and work in precarious areas of employment. On average we have approximately 3,000 client contacts per year. NTWWC, assist women and gender diverse people; clients who often face challenges including intersectional barriers.

The NTWWC targets its services at NT workers who may fall into several categories of workplace vulnerabilities, for instance, who are Aboriginal and Torres Strait Islander (which represent 19% of our

clients), culturally and linguistically diverse (CALD) (24% of our clients), trans women, workers who reside in regional and remote areas (52%) and those who live with a disability (22% of our clients).¹

In addition, we provide community education on workplace rights and issues in addition to tailored training packages to workplaces on topics such as domestic family violence, bullying and sexual harassment.

We conduct research and project work on a range of issues that women experience in relation to work. These have included access to childcare, family friendly practices, the needs of Aboriginal and Torres Strait Islander working women, pregnancy and parental status discrimination, work/life balance, pay equity and the impact of domestic family violence on women workers and their workplaces. In conjunction with the National Alliance of Working Women's Centres, we provide expert advice to government on legal and policy reform.

Employee Perspective

NT Working Women's Centre data shows that restraint clauses normally become an issue for our clients once terminated. This is more so if the employment relationship has ended on acrimonious terms. Employees we see are apprehensive in that restraint clauses may limit their ability to seek a new job opportunity and are often worried and anxious about the prospect of litigation from their previous or current employer. This has led some of our clients to accept reduced compensation or compromise their rights due to stress and concerns associated with these contractual obligations. Examples of this are:

Case Study One and Two.

Case Study One

Betty* was working as a store manager but was terminated.

NT Working Women's Centre represented Betty in an Unfair Dismissal Claim at the Fair Work Commission. In the conciliation, we were instructed by Betty to negotiate a less favourable compensation package because she wanted to take a job that would have breached her Restraint of Trade Clause in her contract. The Restraint period was for 12 months, and the Restraint Area was the

¹ Statistics - 12 months to 30 June 2023

Northern Territory. If she was to adhere to the restrictions and stay in her industry, she would have had to move interstate.

Case Study Two

Madison* worked full-time in a consultancy firm. She experienced sexual harassment and discrimination in the workplace.

NT Working Women's Centre negotiated her terms of her resignation with the employer with compensation due to the serious behaviour.

During negotiations they restricted her from seeking employment with all their clients nationwide as they interpreted their contractual restrictions to include that they had "commissions" with. The employer also attempted to length the restraint time during negotiations. Our client instructed us to proceed and only ask them to remove one business name as she had been offered a position there. Thus, the employer was able to negotiate stronger restraint provisions compared to our client's employment agreement as she did not want anyone to know what the perpetrator did to her.

Employer Business Practices

NT Working Women's Centre agree that there is a growing trend for employers to include numerous restrictive post-employment contractual terms for employees who do not necessarily hold senior management positions or positions in which they have any ability to access sensitive information. We have also found that some contracts fail to select terms they want to enforce whilst leaving in place restrictive enforceable terms in their agreements. A consequence of this is that the asymmetry of power dynamics and bargaining leverage between employers and employees can leave the latter at a disadvantage when navigating complex contractual terms, potential breaches, and enforcement mechanisms. Examples of this include:

Case Study Three and Four.

Case Study Three

Kathleen* worked as a full-time staff coordinator at a security company.

She approached our service due to workplace stress and burnout.

After reviewing her documentation, we were concerned about the following Restraint Clauses in her contract.

For the purposes of clauses 5.1(a) to (e), above:

(a) Restraint Period means:

(i) 12 months; or if that is held to be unenforceable

(ii) 9 months; or if that is held to be unenforceable

(iii) 6 months; or if that is held to be unenforceable

(iv) 3 months.

(b) Restraint Area means:

(i) Australia and New Zealand; or if that is held to be unenforceable

(ii) Australia; or if that is held to be unenforceable

(iii) the State or Territory in which you work and/or are employed as at the date of termination of your employment; or if that is held to be unenforceable

(iv) the greater metropolitan area of the capital city in which you work and/or are employed as at the date of termination of your employment.

Case Study Four

Victoria* works as a full-time support worker for a NDIS provider.

She approached our service as she was stood down after reporting that she was being subjected to discriminatory behaviour. During the investigation the provider reminded her that working for other NDIS providers even on a casual basis breach their policies. As a part of an investigation into her alleged misconduct the employer was satisfied that she breached internal policies by taking an odd casual shift with another NDIS provider, who she previously worked for even though the employer had previously given their consent.

She was not terminated but given a final warning. However, her contract prevents her from seeking work elsewhere in her sector – the terms are below:

(b) Restraint Period means:

(i) 12 months; or

(ii) 6 months; or

(iii) 3 months.

(c) Restraint Area means:

(i) 50km radius from the location described in Item 6 of the Schedule or

(ii) 25km radius from the location described in Item 6 of the Schedule or

(ii) 10km radius from the location described in Item 6 of the Schedule.

Worker Mobility

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The NT Working Women's Centre does not support the notion of restraint clauses being appropriate for part-time, casual or gig workers who usually work numerous jobs to supplement their income and are generally a highly mobile workforce. In relation to full-time workers NT Working Women's Centre are of the view restraint clauses are not suitable for all workers particularly those on low and middle income as well as those who do not hold senior positions within the organisation or privy to sensitive information. Those workers may find themselves with the dilemma of choosing between personal growth opportunities, job mobility, and compliance with contractual terms that can place undue pressure on themselves. For example:

Case Study Five.

Case Study Five

Amanda* works full-time for the Northern Territory Government. She started a small business for additional income.

She received a formal caution from her employer for engaging in outside employment as she did not abide by internal policy and ask permission to continue her business every 12 months.

This policy is in addition to the employees' obligations under section 61 the *Public Sector Employment and Management Act 1993* (NT), which states –

- (1) An employee must not engage in paid employment outside his or her duties as an employee except with the approval of his or her Chief Executive Officer.*
- (2) A Chief Executive Officer must not give approval unless satisfied the paid employment will not interfere with the performance by the employee of his or her duties.*
- (3) In this section: paid employment means employment, work or service for which payment is made by way of pay, salary, honorarium, commission, fee, allowance or other reward.*

Summary

In conclusion, worker mobility offers workers the opportunity to advance careers, acquire diverse experiences, and broaden their skill sets in various professional settings. Balancing the need for organisational protection with respect for employee rights, professional development, and well-being is essential in navigating the complex interplay between mobility and contractual restrictions.